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No. ——

IN THE

Supreme Court of the United States

SAN FRANCISCO BASEBALL ASSOCIATES L.P.,
d/b/a SAN FRANCISCO GIANTS, *et al.*,
Petitioners,

v.

YAN CARLOS RAVELO MONEGRO, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was error for the United States Court of Appeals for the Ninth Circuit, in conflict with the decisions of this Court and other federal courts of appeals, to hold that a district court may dismiss a suit brought by foreign plaintiffs raising numerous claims under foreign law on *forum non conveniens* grounds only if litigation in the district court would be oppressive and vexatious to the defendants?

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, Jack Hiatt is a petitioner in this Court, and was a defendant/appellee below.

The following was a defendant-appellee below:

Luis Rosa.

The following were plaintiffs-appellants below:

Nelson Rolando Gonzalez Sosa;

Franklin Alvares Galvez;

Rafael Micael De La Cruz;

Francisco De Los Santos Heredia;

Porfirio Alfred Vasquez Mota;

Manuel Acevedo;

Angel Esteban Guillen Solano;

Carlos Celedonio Sujilio;

Edelmiro Reyes Santana;

Ignacio Henriquez De La Rosa;

Fernando Romero;

Tulio Miguel Lizardo Nolosco.

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The San Francisco Baseball Associates L.P., d/b/a the San Francisco Giants ("Giants"), and Jack Hiatt respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Ravelo Monegro* v. *Rosa*, 211 F.3d 509 (9th Cir. 2000), which is reproduced in the Petition Appendix ("Pet. App.") at pages 1a-10a. The unpublished order of the court of appeals denying the petition for rehearing is reproduced at Pet. App. 27a-28a. The orders of the district court granting petitioners' motion to dismiss the complaint on *forum non conveniens* grounds, and denying respondents' request to entertain a motion for relief from judgment, are unpublished, and are reproduced at Pet. App. 11a-26a.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2000. Rehearing and rehearing en banc were denied on July 10, 2000. On September 29, 2000, Justice O'Connor granted an extension of time to file a petition for certiorari to November 7, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS INVOLVED

This case involves the federal common law doctrine of *forum non conveniens*. There are no constitutional provisions, treaties, statutes, ordinances, or regulations involved in this case.

STATEMENT OF THE CASE

Petitioner the San Francisco Giants own and operate a major league baseball team in San Francisco, California. The Giants also have minor league affiliates and conduct

business both in the United States and in foreign countries, including the Dominican Republic.

The 13 respondents are all citizens and residents of the Dominican Republic. Allegedly, the respondents are baseball players who formerly had minor league contracts with, or were recruited by, the Giants to play, subject to change, for the Giants' minor league club, the San Pedro de Macoris Giants.

Proceedings In The Dominican Republic. In June, 1997, each respondent filed combined civil and criminal complaints in the Judicial District of San Pedro de Macoris in the Dominican Republic against the Giants and a former scout for the team, Luis Rosa.[1] The complaints alleged that Rosa, while a Giants scout in the Dominican Republic, had sexually harassed them. Certain respondents also brought abuse-of-trust and fraud claims alleging that Rosa had failed to pay them money allegedly due under employment contracts with the Giants. All the alleged illegal conduct took place entirely within the Dominican Republic, and the most significant sources of proof would be found in the Dominican Republic. The complaints alleged civil and criminal violations against Rosa, and sought civil remedies against the Giants for Rosa's conduct.

As affidavits in the record below establish, the judicial system in the Dominican Republic is modeled after the French system. In that system, an individual may bring a combined civil and criminal action, as each respondent did here. The civil and criminal matters proceed together and are decided by the same tribunal. If a civil complaint includes allegations of criminal conduct, the criminal matter is first

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[1] Rosa was a defendant-appellee below, and is a nominal respondent before this Court. This petition will use the term "respondents" to refer only to the plaintiffs in this case.

investigated by the Prosecuting Attorney for the Judicial District. The Prosecuting Attorney, after an initial investigation, may refer the matter to an Investigator Judge. The Investigator Judge then conducts an independent investigation to determine whether to refer the case for trial. Trials in the Dominican Republic are public and adversarial. A single judge presides over the trial in the Penal Chamber of the Court of First Instance in the Judicial District; that judge determines criminal guilt or innocence, as well as civil liability and damages. Appeals may be taken first to a court of appeals and ultimately to the Supreme Court of the Dominican Republic.

The Giants have retained Dominican legal counsel and appeared in all the Dominican proceedings brought against them and Rosa. Although the Giants have formally denied the allegations made against them in those proceedings, they have made their personnel available to the Dominican authorities and have cooperated fully in the investigations. The Giants continue to conduct baseball operations in the Dominican Republic and have never contested the jurisdiction of the Dominican courts. Luis Rosa is a citizen of the United States who resides in Puerto Rico, but he has likewise retained Dominican counsel and has voluntarily appeared in and actively defended himself in the actions proceeding in the Dominican courts. Counsel for Rosa appeared multiple times before the Prosecuting Attorney and the Investigator Judge in the course of their investigations.

Substantial litigation and discovery have taken place in the Dominican proceedings. In a combined civil and criminal proceeding in the Dominican Republic, the Prosecuting Attorney conducts discovery in consultation with the plaintiffs. The Prosecuting Attorney interviews key witnesses identified by the plaintiffs as having relevant information about their allegations. The Prosecuting Attorney in this case is the District Attorney for the Judicial

District of San Pedro de Macoris, the jurisdiction in which respondents reside and in which the alleged conduct took place. Because criminal charges were alleged against Rosa, the District Attorney conducted an initial investigation, interviewing the respondents and a number of present and former employees of the Giants organization. The District Attorney referred the case to the Investigator Judge for the Judicial District in July of 1997, who commenced an independent investigation. In the course of this second investigation, numerous witnesses gave testimony under oath before the Investigator Judge, including respondents, percipient witnesses, Giants personnel, and Luis Rosa himself. The Investigator Judge required Rosa to appear to respond to the allegations against him. Rosa, even though in Puerto Rico at the time, voluntarily returned to the Dominican Republic to meet with the Investigator Judge on October 20, 1997. After the meeting, the Investigator ordered Rosa's arrest and incarceration, and subsequently referred the matter to trial. Rosa remained incarcerated until he was released on bail in March, 1998. As a condition of his bail, Rosa has expressly agreed to return to the Dominican Republic whenever directed to do so by the Dominican Republic authorities.

Rosa appealed the referral of the matter to trial, and that issue is pending before the Chamber of Qualifications of the Judicial Department of San Pedro de Macoris. One of the plaintiffs also filed an appeal challenging denial of a change of venue. That appeal is currently pending before the Supreme Court of the Dominican Republic, the country's highest court. Proceedings in the Court of First Instance, which are currently stayed, will resume upon resolution of the pretrial appeals.

This case is one of great notoriety and national interest in the Dominican Republic. Not only were the allegations sensational and widely reported in the Dominican press, but

in October, 1997, after Rosa's arrest, several of the former players subsequently recanted their claims. The players issued public statements that were covered in the national media apologizing for making false allegations against Rosa and revealing that they were offered money to make the false allegations in the first place. Miguel Angel Mota told the Dominican press, " 'They told me that if I signed the document that accused Rosa I was going to receive a million pesos in cash when the case ended. I saw a great opportunity to become rich.' " Excerpts of Record ("ER") 79. Another claimant, Gabriel McDonald, stated, " 'I was told about a million pesos and a jeep. I was in such an economic situation that I went on their side without giving it much thought. . . . There never was any sexual harassment or anything similar to that.' " *Id.* (internal quotation marks omitted). Accordingly, there is intense interest in the Dominican Republic in rendering justice in this case.

Proceedings in the United States. As noted above, all of the respondents are citizens of the Dominican Republic, the conduct complained of took place almost entirely in that country (except for one alleged incident between Rosa and a single respondent player in Arizona), and the vast majority of the evidence is located in the Dominican Republic. The Dominican courts were the forum of choice initially selected by respondents, and the Dominican judicial system has already devoted substantial resources to resolving this dispute. Nonetheless, in the aftermath of the negative publicity in the Dominican Republic arising out of the players' recantations, respondents filed a parallel suit in April 1998 in the United States District Court for the Northern District of California based on the same factual allegations as their pending Dominican litigation. The suit named Rosa and

petitioners (the Giants and Jack Hiatt,[2] a Giants employee) as defendants. The complaint asserted 16 claims for relief, eight of them arising directly under Dominican law. ER 18-42. Among those 16 claims was a single federal-law claim that defendants violated Title VII of the Civil Rights Act of 1964, ER 18, despite the clear statutory bar on extraterritorial application of Title VII. See 42 U.S.C. § 2000e-1(a) (Title VII "shall not apply to an employer with respect to the employment of aliens outside any State"). The remaining non-Dominican counts were patently frivolous claims alleging violations of California and New York state statutory laws (such as a claim that petitioners were liable under the penal and civil provisions of the California Code governing battery and sexual battery, ER 18-19), although none of the respondents was alleged to have ever been present in either state, and none of Rosa's claimed misconduct was alleged to have occurred there.[3]

District Court Decision. Petitioners filed a motion to dismiss the complaint, which the district court granted on the grounds of *forum non conveniens*. In a thoroughly considered opinion, the district court faithfully applied the standards set forth by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). Pet. App. 15a-16a. The district court first determined that the alternative forum was adequate. Under this Court's precedents, "[o]rdinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper*, 454 U.S. at 254 n.22 (quoting *Gilbert*,

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[2] The allegations against Hiatt reference only his alleged supervisory role, and there is no allegation that Hiatt engaged in any alleged sexual harassment or other alleged misconduct against respondents.

[3] Pursuant to Rule 14(g)(ii) of the Rules of this Court, petitioners state that the district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1332, and 1367. Respondents also claimed jurisdiction for the district court under 42 U.S.C. §§ 2000e-1 to -15 and 28 U.S.C. § 1343.

330 U.S. at 506-07). Noting this rule, Pet. App. 16a-17a, the district court found this threshold requirement satisfied because both Rosa and the Giants had voluntarily appeared in the Dominican proceedings and accepted the jurisdiction of the Dominican courts. *Id.* The district court further found that the record evidence before it refuted respondents' arguments that Dominican courts lacked jurisdiction to resolve disputes if some activity occurred in the United States; that the Dominican Republic provided no remedy for wrongful termination; that no civil discovery would be available; and that the Dominican judicial system was corrupt (a claim that respondents' counsel conceded at the hearing was unsupported). *Id.* at 17a-19a.[4]

Turning to the factors bearing on convenience of the forum, the district court carefully balanced the private and public interest factors set out in *Gilbert*, 330 U.S. at 508-09. In terms of private interest, the district court found that "[t]he most significant sources of proof, particularly the plaintiffs themselves and other percipient witnesses to Rosa's conduct and the relationship between Rosa and the plaintiffs, are in the Dominican Republic." Pet. App. 19a. The court also held that the greater difficulty and expense in transporting numerous Dominican witnesses to the United States outweighed any burdens in bringing any relevant American witnesses, documents, and financial records to the Dominican Republic. The district court discounted the lack of compulsory process against Rosa in the Dominican Republic because he had already voluntarily appeared in the Dominican courts and had agreed to return for further proceedings. Moreover, the court found that respondents'

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[4] The district court also held in the alternative that any inability to pursue a specific cause of action did not render a forum inadequate so long as some remedy for the conduct was provided, and that the differences in discovery procedures (even if there were any) would not make a forum inadequate. Pet. App. 18a.

desire for easier enforcement of any future judgment did not outweigh the burdens the court had identified. *Id.* at 19a-20a.

The district court also determined that the public interest factors manifestly weighed in favor of dismissal. Noting *Gilbert*'s concern about burdening citizens with jury duty in cases that do not belong in a forum, 330 U.S. 508-09, the district court held that "San Francisco's interest in these proceedings is minimal compared with the Dominican Republic's," because any interest in the actions and reputation of a local baseball team pales next to the Dominican Republic's "much greater interest in ensuring that its citizens are not harmed by foreign employers." Pet. App. 20a. Given the prevalence of baseball recruitment and hiring in that country, the public interest in having localized controversies settled at home also weighed in favor of the Dominican Republic. *Id.* at 20a-21a. Finally, the district court noted that either forum would have to apply foreign law. However, given that respondents raised only a single federal claim (the Title VII claim), which the district court correctly considered to be of dubious viability, it noted that "all of the claims in this action would require the district court to apply foreign law. The Dominican courts, on the other hand, would be applying both Dominican and foreign law." *Id.* at 21a. The district court accordingly dismissed the complaint on the grounds of *forum non conveniens*. *Id.*

Respondents thereafter filed a notice of appeal, which divested the district court of jurisdiction. *Crateo, Inc.* v. *Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976); *Rutherford* v. *Harris County*, 197 F.3d 173, 190 (5th Cir. 1999). Subsequently, although recognizing that the district court no longer had jurisdiction over this matter, respondents pursuant to Ninth Circuit procedure "filed a motion asking whether the [district court] would entertain a motion for relief from judgment pursuant to Federal Rules of Civil Procedure 60(b)," and attached third-party affidavits indicating that

Rosa had supposedly said he would not return to the Dominican Republic. Pet. App. 22a, 23a. Respondents "filed this request in the hope that the Ninth Circuit will remand the case if the Court is willing to entertain such a motion." *Id.* at 23a. After confirming its lack of jurisdiction, the district court declined to entertain such a motion, even if jurisdiction were returned to it, because the new affidavits would not affect the outcome of the case. The district court pointed out that, even if the affidavits were credited, respondents had failed to demonstrate that Rosa could not be extradited, or that a Dominican court would not accept Rosa's videotaped testimony, which a district court could compel upon request. *Id.* at 24a-26a. Because the district court's denial of respondents' request was not a binding order within its proper jurisdiction, respondents did not appeal (and could not have appealed) this decision.[5]

Court of Appeals Decision. On appeal, the Ninth Circuit reversed. In a dramatic departure from existing law, it declared "that 'the standard to be applied to a motion for dismissal on the grounds of forum non conveniens is whether defendants have made a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent.' " Pet. App. 10a (brackets and ellipses omitted) (selectively quoting from *Cheng* v. *Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir. 1983)). The Ninth Circuit declared that the district court "misunderstood this

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[5] Even if the district court's denial of respondents' request that it entertain a Rule 60(b) motion could somehow be considered an appealable order, since no separate notice of appeal was ever taken to that denial, the circuit court lacked jurisdiction to review or even consider the district court's disposition of the Rule 60(b) request. *Stone* v. *INS*, 514 U.S. 386, 401-03 (1995); *Phonometrics, Inc.* v. *Northern Telecom Inc.*, 133 F.3d 1459, 1467 (Fed. Cir. 1998); *Williams* v. *Chater*, 87 F.3d 702, 704-05 (5th Cir. 1996).

standard" and failed to "treat[] forum non conveniens as an exceptional tool to be employed sparingly." *Id.*

Rather than engage in the required, highly deferential review of the district court's balancing of properly identified public- and private-interest factors, see *infra* at 18, the Ninth Circuit instead framed the issue as whether this case was factually distinguishable from *Piper*, and found that "[t]his case is unlike *Piper* in a number of respects." Pet. App. 8a. First, entirely ignoring the district court's fact-based analysis of the relative interests of the United States and Dominican Republic regarding alleged sexual harassment of Dominican employees occurring in the Dominican Republic, the Ninth Circuit instead substituted its opinion that San Francisco has a "substantial relation to the action." *Id.* According to the Ninth Circuit, this "substantial relation" arose simply through the signing of minor league baseball contracts, from which respondents "formed the legitimate expectation" that they might someday play in the United States, "possibly in San Francisco for the Giants themselves." *Id.*

Second, the Ninth Circuit held that "unlike *Piper*, there are no possible co-defendants or possible third-party defendants who could not be made to appear in the American forum." Pet. App. 9a. Rather, according to the court of appeals, the problem was the possibility that one witness—Rosa—might not appear to defend himself in the Dominican Republic. The Ninth Circuit rejected the district court's reliance on Rosa's active ongoing defense in the Dominican proceedings and his agreement, as a condition of his release on bail, to return for future proceedings because "[t]he plaintiffs expressed concern that Rosa's 'agreement' was feigned." *Id.* The Ninth Circuit credited this "concern" because of the affidavits that respondents as part of their denied request to the district court to indicate a willingness to entertain a Rule 60(b) motion. *Id.* The Ninth Circuit relied on the affidavits even though they

had not been before the district court when it issued its dismissal order (the only matter under appeal), and were thus not a part of the proper record on appeal. The Ninth Circuit faulted the district court for not "amending its dismissal order in response to plaintiffs' Rule 60(b) motion," *id.*, notwithstanding that (i) respondents never actually made a Rule 60(b) motion and (ii) the district court would not have had jurisdiction to issue such an amended dismissal order regarding a matter then on appeal. Furthermore, the Ninth Circuit did not even address the district court's reasons for finding that these affidavits would be immaterial in any event: namely, that Rosa may be subject to extradition or to compelled videotape testimony if he failed to return to the Dominican Republic. See *id.* at 24a-26a.

Third, disregarding the district court's analysis that most of the witnesses to the relevant conduct would likely be Dominican, the Ninth Circuit declared that "unlike *Piper*, there is no showing that access to proof—even aside from Rosa's testimony—would be easier in the Dominican Republic." Pet. App. 9a. It therefore reversed the district court and remanded the case for further proceedings.

REASONS FOR GRANTING THE PETITION

In this age of globalization, the issue of where a dispute should be litigated—in this country or another—arises with increasing frequency. The Ninth Circuit has now declared that, even where a foreign plaintiff has initiated prior parallel litigation in a foreign court over conduct occurring in that foreign country, a federal district court may only dismiss a second suit brought by the same foreign plaintiff on the same allegations if the American defendants can prove " 'such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent.' " Pet. App. 10a. Applying this new truncated standard of its own making, which is directly

contrary to the rulings of this Court, the Ninth Circuit reversed the district court's *forum non conveniens* dismissal on the basis of three claimed factual distinctions from *Piper*, *id.* at 8a-10a, notwithstanding the fact that the Dominican proceedings had been underway for more than two years.

Where, as here, a foreign proceeding is already commenced, the decision of the court of appeals essentially compels the result that litigation be pursued simultaneously in both this country and the foreign country where the original litigation arose, absent "exceptional" circumstances. See Pet. App. 10a. In effect, all of the public- and private-interest factors that weigh against duplicative litigation in this country are cast aside in favor of an overarching desire to accord the foreign plaintiff *an additional* choice of forum. This position conflicts with decisions of this Court and other courts of appeals and promotes duplicative, inefficient and costlier litigation for no good reason. This Court should grant the petition to clarify and reaffirm the proper analysis to be applied to the *forum non conveniens* doctrine, and to prevent the confusion and vitiation of that doctrine which would otherwise occur as a result of the Ninth Circuit's standard.

I. THE DECISION BELOW CONFLICTS WITH PRECEDENT OF THIS COURT.

In announcing a stringent standard requiring oppression and vexation of defendants before a district court may dismiss a suit brought by foreign plaintiffs on the grounds of *forum non conveniens*, Pet. App. 10a, the Ninth Circuit has disregarded this Court's precedent.

Under this Court's prior decisions, even in cases where a domestic United States plaintiff sues in his or her home forum, the existence of oppression or vexation of defendants is not an absolute prerequisite for a *forum non conveniens* dismissal. In *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), this Court held instead that oppression

and vexation was but one alternative basis upon which a *forum non conveniens* dismissal could be premised:

> [A plaintiff] should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which *either* (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, *or* (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.

Id. at 524 (emphasis added). In applying this standard, this Court had mandated that a district court looks to various private- and public-interest factors bearing on convenience of the forum to determine whether to decline jurisdiction. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-09 (1947) (cataloging factors).

In *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), this Court recognized that the *Gilbert/Koster* standard should be moderated for suits brought in federal court by foreign plaintiffs. *Stewart* v. *Dow Chem. Co.*, 865 F.2d 103, 106 (6th Cir. 1989). This Court reasoned that the strong presumption in favor of home-forum plaintiffs, which "may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum," *Piper*, 454 U.S. at 255, makes no sense when the plaintiff is foreign. The difference is that "[w]hen the home forum has been chosen, it is reasonable to assume that the choice is convenient." *Id.* at 255-56. The assumption of plaintiff's convenience is why *Koster* and *Gilbert* required oppression and vexation of the defendant, or some other administrative or legal difficulty, to be clearly shown. *Koster*, 330 U.S. at 524. By contrast, "[w]hen the plaintiff is foreign," this Court concluded, "this assumption is much less reasonable." *Piper*, 454 U.S. at 256. Accordingly, "[b]ecause the central purpose

of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference," *id.*, and the determination of convenience by application of the *Gilbert* public and private interest factors "is committed to the sound discretion of the trial court." *Id.* at 257. Nowhere did this court in *Piper* suggest that a foreign plaintiff's choice of a U.S. forum must be respected unless, as the Ninth Circuit held below, there has been " 'a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent.' " Pet. App. 10a (ellipsis omitted).

The Ninth Circuit's decision turns this Court's precedent on its head. It transforms a legal standard developed to explain the rare circumstances in which a court can *reject* a domestic plaintiff's choice of its *home* forum into a rule requiring courts in the Ninth Circuit to accept a *foreign* plaintiff's choice of a *United States* forum, absent exceptional circumstances. The decision below effectively negates *Piper* by adopting a *forum non conveniens* rule for foreign plaintiffs that is far more stringent than even the rule for home-forum plaintiffs established in *Koster* and *Gilbert*.

The Ninth Circuit's oppression-and-vexation standard for foreign plaintiffs appears to be a conscious departure from this Court's precedents. The Ninth Circuit was well aware of *Koster*, which it cited, see Pet. App. 5a, but plainly did not follow. Moreover, the Ninth Circuit purported to derive its standard from its own circuit precedent, *Cheng* v. *Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983). See Pet. App. 10a. But *Cheng*, which was a case involving both American and foreign plaintiffs, 708 F.2d at 1411, properly recited the *Koster two*-part standard, *id.* at 1410. In the instant case, the court of appeals deliberately truncated its quotation of *Cheng* to establish that only the first prong—oppression and

vexation—will now be the governing standard of the circuit. See Pet. App. 10a.

Adopting this truncated standard allowed the Ninth Circuit to state a rule that, even in suits brought by foreign plaintiffs, *forum non conveniens* is "an exceptional tool to be employed sparingly." Pet App. 10a. Under the Ninth Circuit's ruling, a foreign plaintiff will almost always be able to avail itself of an American forum if it sues an American company in that company's home court, no matter how focused the facts of dispute may be on the foreign plaintiff's county of origin, and no matter that duplicative proceedings brought by the same foreign plaintiff are already pending abroad.

The Ninth Circuit's standard declares open season on American companies who do business abroad. Now, absent "exceptional circumstances," foreign plaintiffs may flood federal courts with (even duplicative) suits against American companies, even though the suits arise from conduct occurring exclusively in foreign jurisdictions, simply because they prefer American procedures or remedies (such as juries, punitive damages, or attorneys' fees) unavailable in the foreign courts where such actions should be determined. Indeed, under the Ninth Circuit's standard, it is difficult to envision how a defendant could ever demonstrate that being sued in its home court is seriously vexatious or oppressive, given the Ninth Circuit's declaration that the home forum is "the quintessentially convenient forum for the defendant." Pet. App. 6a.

The Ninth Circuit's new rule and the strong presumption against *forum non conveniens* dismissals it creates are flatly inconsistent with *Piper*.[6] This Court has not hesitated in

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[6] By establishing a strong presumption against *forum non conveniens* dismissals and thus creating an incentive for foreign plaintiffs to sue in American courts, the Ninth Circuit's rule is also at odds with *American Dredging Co.* v. *Miller*, 510 U.S. 443 (1994). In that case, this Court

recent years to curb the Ninth Circuit's departures from established law, and resolution of this issue is particularly urgent given the importance of this doctrine to the administration of the federal courts. See Sup. Ct. R. 10(c). The conflict with this Court's rulings alone warrants a grant of certiorari.

II. THE DECISION BELOW CREATES A SQUARE CONFLICT WITH OTHER COURTS OF APPEALS.

Not only does the decision below conflict with the precedents of this Court, but the standard it announced also creates a 2-2 split among the Circuits. The Third Circuit, in a case cited approvingly by the Ninth Circuit, Pet. App. 10a, is aligned with the Ninth. *Lony* v. *E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 635 (3d Cir. 1989) (in a case brought by a foreign plaintiff, American defendant "ha[s] the burden of establishing that trial in the chosen forum would establish oppressiveness and vexation of a defendant" (internal quotation marks and ellipsis omitted)).[7]

On the other side, the Sixth Circuit has squarely rejected the standard that a foreign plaintiff's choice of forum must create an "oppressive" burden on the defendant before a *forum non conveniens* dismissal may be granted. *Stewart* v.

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stated that, given the fact-specific and discretionary nature of the district court's inquiry, "*forum non conveniens* cannot really be *relied* upon in making decisions about ... where to sue or where one is subject to being sued," and therefore the doctrine should not affect the litigation decisions of foreign plaintiffs. *Id.* at 455. In the Ninth Circuit, by contrast, foreign plaintiffs may sue in federal district court secure in the knowledge that this important and longstanding but now "exceptional" doctrine poses no realistic threat of dismissal.

[7] *Lony* takes this quotation from *Piper*, *see* 886 F.2d at 635, but it is simply the passage in *Piper* reciting the standard established in the earlier cases of *Gilbert* and *Koster*. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 241 (1981).

Dow Chem. Co., 865 F.2d 103, 106 (6th Cir. 1989) (creating "[s]uch a high standard would constitute a misreading of *Piper* and its progeny"); *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 454 (6th Cir. 1988) (oppression-and-vexation standard is applicable only to suits brought by a United States plaintiff). The Second Circuit has likewise characterized *Piper* as establishing "a neutral rule that compares the convenience of the parties" and "consider[s] each party's residence as a factor that bears on the inconvenience that party might suffer." *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d. 88, 102 (2d Cir. 2000). The Second Circuit limited the rule adopted by the Ninth Circuit to lawsuits filed by United States citizens. "[T]he *Gilbert* factors will favor dismissal (in the absence of strong public interest factors favoring dismissal) only if the defendant[s] [in a lawsuit brought by domestic plaintiffs] can establish ' "such oppressiveness and vexation . . . as to be out of all proportion to the plaintiff's convenience." ' " *Id.* (omission in original) (quoting *Guidi* v. *Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000) (quoting *Koster*, 330 U.S. at 524)). There is thus a square and mature conflict among the Circuits that this Court should resolve.

There is also a secondary split of authority implicated by the Ninth and Third Circuit's extreme view of the "deference" to be afforded a foreign plaintiff's choice of a U.S. forum for litigation. Whereas those courts of appeals regard some deference to the foreign plaintiff's choice as automatic, see Pet. App. 10a, the Fifth Circuit has stated that a foreign plaintiff bears "some burden to show that it chose the United States forum for the sake of convenience and not merely to obtain the benefit of favorable law," and has expressly disapproved the Third Circuit's requirement that the district court indicate the degree of deference it is according the foreign plaintiff's choice. *Empresa Lineas Maritimas Argentinas, S.A.* v. *Schichau-Unterweser, A.G.*, 955 F.2d 368, 373 (5th Cir. 1992). There is thus substantial

division of opinion in the courts of appeals over the proper standards for assessing *forum non conveniens* dismissals of actions brought by foreign plaintiffs, a vital issue of law in an increasingly global age.

III. THE NINTH CIRCUIT'S REASONS FOR DISTINGUISHING *PIPER* ARE IRRELEVANT AND WRONG.

In keeping with its announced legal standard that *forum non conveniens* is an exceptional doctrine applied only when the burden on defendants is oppressive and vexatious, the court of appeals reversed the district court because it identified three factual distinctions between this case and *Piper*. Pet. App. 8a-10a. This analysis finds no support in *Piper* or other precedents of this Court. Necessarily, " '[e]ach case turns on its facts,' " *American Dredging Co.* v. *Miller*, 510 U.S. 443, 455 (1994) (quoting *Piper*, 454 U.S. at 249), and this Court has mandated that courts of appeals are limited to undertaking highly deferential appellate review of a district court's discretionary balancing of *Gilbert* factors. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981) (a *forum non conveniens* determination "may be reversed only when there has been a clear abuse of discretion; where the [district] court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference"); *Alfadda* v. *Fenn*, 159 F.3d 41, 45 (2d Cir. 1998) ("[o]ur review of a *forum non conveniens* motion is severely cabined," permitting reversal only if discretion is " 'clearly abused' "); *Kontoulas* v. *A.H. Robins Co.*, 745 F.2d 312, 314 (4th Cir. 1984) (" 'Our only role is to determine whether or not the action of the district court was so unreasonable or so arbitrary as to be beyond the range of its discretion.' "). In examining a district court's analysis of the public and private factors, it is inappropriate for a court of appeals to substitute its own judgment for that of the district court. *Piper*, 454 U.S. at 257. Despite giving

lip service to *Piper*, Pet. App. 3a, the Ninth Circuit did not follow the deferential review of the district court's balancing of the *Gilbert* factors, which has been mandated by this Court.

Not only was the Ninth Circuit's approach erroneous, but its attempt to distinguish *Piper* is misguided. First, the Ninth Circuit claimed that "unlike *Piper*," the San Francisco district court was "a forum with a substantial relation to the action," simply because of respondents' putative expectation that they *might* someday play their way onto a team in the United States ("possibly in San Francisco for the Giants themselves"). Pet. App. 8a. To the extent a mere future expectation can even colorably be deemed a "substantial relation" to the San Francisco forum, it is far less than the relation of the action to the American forum in *Piper*, which this Court agreed was insufficient to require a retention of federal court jurisdiction. There, the defendants were American manufacturers sued in federal district court in Pennsylvania on a products-liability theory for an aircraft manufactured in Pennsylvania and propellers manufactured in Ohio. 454 U.S. at 239. Thus, in *Piper*, all of the defendants' alleged illegal conduct (though not the evidence of injury) occurred in the United States. Here, neither the illegal conduct nor any direct evidence of injury to respondents occurred in the American forum. The Ninth Circuit's "substantial relation" distinction is a makeweight.

The Ninth Circuit also suggested that the American forum was more favorable in this case than in *Piper* because "it is not clear" that one of the witnesses, defendant Luis Rosa, could be compelled to testify as a witness in the Dominican forum. Pet. App. 9a. But, in virtually every case involving a mixture of American and foreign witnesses, no single forum will be able to issue compulsory process to all witnesses. Indeed, here, there are numerous nonplaintiff witnesses from the Dominican Republic who are not subject to compulsory

process in federal district court. For example, the Giants would likely need to call Miguel Angel Mota and Gabriel McDonald, two former players who recanted their allegations against Rosa in the Dominican Republic, in order to expose the truth of these allegations. The acquaintances of respondents, various percipient witnesses, and former staff and personnel of the Giants in the Dominican Republic are critical to petitioners' defense; those individuals are not subject to the compulsory process of the district court, and many have no incentive to come to testify voluntarily on behalf of petitioners in the United States. There is simply no warrant for the court of appeals to focus so heavily on whether there is compulsory process in the foreign court over a single witness—particularly one whose absence would hardly prejudice the foreign plaintiffs in a case where the foreign jurisdiction otherwise had by far the closer connection to the entire dispute. *Id.* As this Court indicated in *Piper*, central emphasis is not to be placed on any one factor, otherwise "the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." 454 U.S. at 250.

In any event, there is no clear abuse of discretion in the district court's reliance on the undisputed record evidence before it that "Rosa has already voluntarily appeared in the proceedings in the Dominican Republic and has agreed to return to the Dominican Republic to participate in further legal proceedings." Pet. App. 19a-20a. An appellate court's uncertainty and substitution of its opinion over a non-dispositive factual issue is hardly a basis for ruling that the district court clearly abused its discretion. This is especially true when such uncertainty was the result of the Ninth Circuit's improper reliance on affidavits that were not even a proper part of the appellate record with respect to the dismissal order on appeal. See *supra* at 8-9.

Finally, the Ninth Circuit claimed that, unlike *Piper*, there was no evidentiary showing that access to proof would be easier in the Dominican Republic. Pet. App. 9a. But *Piper* established no particular evidentiary requirement, and indeed rejected a court of appeals ruling that "defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum." *Piper*, 454 U.S. at 258. All that is required is that there be "enough information to enable the District Court to balance the parties interests." *Id.* Here, it is obvious from the face of the pleadings and from the situs of the complained of conduct that most of the witnesses would be in the Dominican Republic. Thus, it was not an abuse of discretion for the district court to conclude that there would be greater difficulty and expense in bringing a greater number of Dominican citizens to the United States than transporting a lesser number of American citizens and some financial records to the Dominican Republic. Moreover, the administrative difficulties of discovery and trial posed by this litigation in a United States district court are immense. Experts on French-influenced Dominican law would have to testify (probably through a translator) on the meaning of foreign-language legal concepts; a San Francisco district court would be attempting to supervise discovery occurring almost entirely in the Dominican Republic and involving witnesses beyond the reach of its compulsory process; and the great majority of fact witnesses would be Spanish-speaking individuals whose testimony would have to be filtered by translation to a jury. Given all these considerations, and the fact that duplicative trials are inherently burdensome on defendants, see *id.* at 259, the district court's order of dismissal should have been upheld under any reasonable interpretation of *Piper*.

Review of the district court's thoughtful balancing of all the relevant *Gilbert* factors shows that the district court had

ample grounds here to dismiss this complaint on grounds of *forum non conveniens*. The Ninth Circuit reversed that dismissal by establishing a vexation-and-oppression standard for suits brought by foreign plaintiffs that is in direct conflict with the precedents of this Court and of other courts of appeals. The decision below promises nothing but mischief in an international economy where American multinational companies conduct a great deal of business abroad. "The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive," which would only "further congest already crowded courts." *Id.* at 252 (footnote omitted). This Court should act to resolve the mature and important conflict of authority that now exists with respect to this critical tool for ensuring a sensible allocation of jurisdiction between United States and foreign courts.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT.

No. 98-16846.

YAN CARLOS RAVELO MONEGRO; NELSON ROLANDO GONZALEZ SOSA; FRANKLIN ALVARES GALVEZ; RAFAEL MICAEL DE LA CRUZ; FRANCISCO DE LOS SANTOS HEREDIA; PORFIRIO ALFRED VASQUEZ MOTA; MANUEL ACEVEDO; ANGEL ESTEBAN GUILLEN SOLANO; CARLOS CELEDONIO SUJILIO; EDELMIRO REYES SANTANA; IGNACIO HENRIQUEZ DE LA ROSA; FERNANDO ROMERO; TULIO MIGUEL LIZARDO NOLOSCO,

Plaintiffs-Appellants,

v.

LUIS ROSA; JACK HIATT; SAN FRANCISCO BASEBALL ASSOCIATES, L.P., DBA SAN FRANCISCO GIANTS,

Defendants-Appellees.

Argued and Submitted Dec. 6, 1999

Filed May 3, 2000

Appeal from the United States District Court
for the Northern District of California.

Before: BRIGHT,[1] PREGERSON and W. FLETCHER, Circuit Judges.

W. FLETCHER, Circuit Judge:

Plaintiffs brought suit in the United States District Court for the Northern District of California against the San Francisco Baseball Associates ("the Giants"), the Giants' Latin America scout, Luis Rosa, and the Giants' Minor League Coordinator, Jack Hiatt, for violations of federal and state law including sexual harassment, sexual battery, wrongful termination, fraud and conversion. The district court dismissed plaintiffs' action on the ground of forum non conveniens, concluding that the Dominican Republic was the better forum for the suit. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I

The thirteen plaintiffs are aspiring professional baseball players who live in the Dominican Republic. When they were between sixteen and twenty years old, they were recruited by Luis Rosa, the Giants' former Latin America scout. At Rosa's instigation, each player signed a seven-year minor league contract with the Giants. Although the contracts initially provided that all the plaintiffs would play baseball for the San Pedro Giants in the Dominican Republic, the contracts could be assigned, and the players transferred, to minor or major league teams in the United States. Underscoring this potential for transfer, many of the contracts contained addenda stating salaries in Bellingham, Washington, Scottsdale, Arizona, and Shreveport, Louisiana.

Playing for the San Francisco Giants or some other United States team was the plaintiffs' common goal. All thirteen

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[1] Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

plaintiffs claim that Rosa expressly conditioned their continued employment and/or reassignment to United States teams upon their submitting to his sexual advances, and that Rosa appropriated part of their earnings or signing bonuses for his own use. They also allege that the Giants' management knew or had reason to know of Rosa's misconduct. In April 1998, plaintiffs initiated this suit against the Giants, Rosa and Hiatt.

In June 1997, plaintiffs had brought substantially similar allegations to the attention of authorities in the Dominican Republic. As a result of their complaints, a combined criminal and civil suit against the Giants and Rosa is now pending in the Dominican Republic. Noting the pendency of this "parallel" proceeding, the defendants moved in June 1998 to dismiss plaintiffs' complaint on the alternative grounds of forum non conveniens and abstention. The district court granted the defendants' motion on the ground of forum non conveniens. Plaintiffs timely appeal.

II

A forum non conveniens determination "is committed to [the] sound discretion of the trial court," and "may be reversed only when there has been a clear abuse of discretion." *Creative Tech., Ltd. v. Aztech Sys. Pte Ltd.*, 61 F.3d 696, 699 (9th Cir.1995). A district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of relevant factors. *See K.V. Mart Co. v. United Food & Commercial Workers Int'l Union, Local 324*, 173 F.3d 1221, 1223 (9th Cir.1999); *Creative Tech.*, 61 F.3d at 699.

III

A threshold issue is whether, under *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), a forum non conveniens motion in federal court is governed by

federal or state law. The Supreme Court expressly avoided deciding this issue in *Piper Aircraft v. Reyno*, 454 U.S. 235, 248 n. 13, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Since *Piper*, however, several circuits have held that a forum non conveniens motion in federal court is governed by federal law. *See Rivendell Forest Prods. Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 992 (10th Cir.1993); *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis, Ltda.*, 906 F.2d 45, 50 (1st Cir.1990); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1159 (5th Cir.1987) (en banc), *vacated on other grounds*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989), *prior opinion reinstated in relevant part*, 883 F.2d 17 (5th Cir.1989); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir.), *cert. denied*, 474 U.S. 948, 106 S.Ct. 347, 88 L.Ed.2d 294 (1985). *But see In Re Air Crash Disaster*, 821 F.2d at 1180-86 (Higginbotham, J., concurring in the judgment) (arguing that state forum non conveniens law should apply to diversity actions in federal court); *Weiss v. Routh*, 149 F.2d 193, 195 (2d Cir.1945) (L. Hand, J.) (stating that state law should control a federal court's assertion of jurisdiction). We join these circuits and hold that federal rather than state law governs. We agree with the Fifth Circuit's conclusion that "the interests of the federal forum in self-regulation, in administrative independence, and in self-management" are more important than any interest in uniformity between the federal and state forums in a single state. *In re Air Crash Disaster*, 821 F.2d at 1159. Our conclusion is reinforced by the Supreme Court's statement in *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), that "the doctrine [of forum non conveniens] is one of procedure rather than substance." *Id.* at 453, 114 S.Ct. 981 (upholding the application in state court of a state forum non conveniens rule in a Jones Act admiralty case).

We note, however, that the result in this case would likely be the same if we applied California's law of forum non conveniens. *See* Cal.Civ.Proc.Code § 410.30. When the Supreme Court reserved the *Erie* issue in *Piper*, it observed that California and federal forum non conveniens laws were "virtually identical." *Piper*, 454 U.S. at 249 n. 13, 102 S.Ct. 252. While this statement was almost certainly untrue when made, *see* 2 B. Witkin, *California Procedure* Jurisdiction §§ 304-306 (3d ed.1985); *Holmes v. Syntex Labs.*, 156 Cal.App.3d 372, 202 Cal.Rptr. 773 (1984), it appears to have become true since then. *See Stangvik v. Shiley, Inc.*, 54 Cal.3d 744, 1 Cal.Rptr.2d 556, 819 P.2d 14 (Cal.1991).

IV

There are two types of cases in which forum non conveniens dismissals have been deemed appropriate in federal court. In the first type, now rarely encountered, a foreign or domestic plaintiff chooses a forum with little or no relation to either the defendant or the action in order to disadvantage the defendant. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 67 S.Ct. 828, 91 L.Ed. 1067 (1947). In the second type, now more commonly encountered, a foreign plaintiff chooses the home forum of an American defendant in an action that has little or no relation to the United States in order to take advantage of more favorable American procedural or substantive rules. *See, e.g., Piper*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419.

The first type of case was common in federal courts before the adoption of 28 U.S.C. § 1404(a) in 1948. For example, in *Gilbert*, decided just before the passage of § 1404(a), a Virginia plaintiff sued Pennsylvania-based Gulf Oil in the Southern District of New York based on Gulf's allegedly negligent delivery of gasoline and an ensuing explosion at Gilbert's Virginia warehouse. *Gilbert*, 330 U.S. at 502-03, 67 S.Ct. 839. In upholding a forum non conveniens dismissal,

the Court articulated a number of private and public interest factors relevant in assessing whether "exceptional circumstances" justified a forum non conveniens dismissal. *Id.* at 504, 67 S.Ct. 839. "Private interest factors" included the relative ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, the comparative cost of obtaining willing witnesses, the possibility of a view of any affected premises, the ability to enforce any judgment eventually obtained, and "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508, 67 S.Ct. 839. "Public interest factors" included court congestion, the unfairness of burdening citizens in an unrelated forum with jury duty, the interest in having localized controversies decided at home, the interest in trying the case in a forum familiar with the applicable law, and the interest in avoiding unnecessary conflicts of laws. *See id.* at 508-09, 67 S.Ct. 839.

Rather than requiring dismissal and refiling of a suit where the alternative forum is another federal court, § 1404(a) now allows transfer of a case from one federal district court to another "for the convenience of parties and witnesses in the interest of justice." 28 U.S.C. § 1404(a). Section 1404(a) thus serves as a statutory substitute for forum non conveniens in federal court when the alternative forum is within the territory of the United States. The doctrine of forum non conveniens survives in federal court only when the alternative forum is in a foreign country. As a consequence, a forum non conveniens motion in a *Gilbert*-type case is now rare, for foreign plaintiffs seeking to avoid their home forums by filing in the United States do not typically sue in a forum with little or no relation to either the defendant or the action. Indeed, foreign plaintiffs typically bring such suits in the quintessentially convenient forum for the defendant—the defendant's home forum.

In *Piper*, the Supreme Court adapted the analytic structure of *Gilbert* to take into account the special characteristics of a case in which a foreign plaintiff sues an American defendant in its home forum. *Piper* arose out of the crash of a small plane in the Scottish highlands that killed the Scottish pilot and five Scottish passengers. Gaynell Reyno was appointed as administratrix of the estates of several of the passengers for the purpose of filing a wrongful death action in California state court against Piper Aircraft and Hartzell Propeller, the manufacturers of the plane and its propeller. Defendants removed the case to federal district court in California under 28 U.S.C. § 1441. Pursuant to 28 U.S.C. §§ 1404(a) and 1406(a),[2] defendants then secured its transfer to the Middle District of Pennsylvania, the home of Piper's manufacturing plant.

Even though the action was now brought in Piper's home forum, the Pennsylvania district court granted defendants' motion to dismiss under forum non conveniens, finding that a combination of the public and private interest factors derived from *Gilbert* overwhelmingly favored the Scottish forum. The decedents were Scottish; all the real plaintiffs in interest and witnesses were Scottish; trial would be aided by local familiarity with Scottish geography; and crucial evidence in Scotland was beyond the reach of the district court's compulsory process. Further, there was a significant risk of inconsistent verdicts because there was a separate action filed in Scotland, and defendants Piper and Hartzell could not reduce or eliminate that risk by impleading as third-party defendants the charter company and the estate of the pilot. Finally, the district court stressed that it was unfamiliar with Scottish law, and that since different law applied to different

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[2] The suit against Hartzell was transferred under § 1406 rather than § 1404(a) because of a lack of personal jurisdiction over Hartzell in California.

defendants, a trial in the United States would be "hopelessly complex and confusing." *See Reyno v. Piper Aircraft Co.*, 479 F.Supp. 727, 732-34 (M.D.Pa.1979).

In sustaining the district court's dismissal, the Supreme Court generally endorsed the district court's reliance on the *Gilbert* factors, but gave special attention to two factors peculiar to a case brought in the United States against American defendants by a foreign plaintiff. First, the possibility of less favorable substantive law in the plaintiff's home forum "should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."[3] *Piper*, 454 U.S. at 247, 102 S.Ct. 252. Second, in contrast to the strong presumption in favor of a domestic plaintiff's forum choice, "a foreign plaintiff's choice deserves less deference." *Id.* at 256, 102 S.Ct. 252.

V

This case is unlike *Piper* in a number of respects. First, unlike *Piper*, plaintiffs' chosen forum is more than merely the American defendants' home forum. It is also a forum with a substantial relation to the action. Plaintiffs allege that the Giants, through their agent, Rosa, solicited and entered into contracts with the plaintiffs. Based on these contracts, plaintiffs formed the legitimate expectation that if they demonstrated sufficient skill they would be able to play professional baseball in the United States, possibly in San Francisco for the Giants themselves.

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[3] Note that the difference in substantive law will not be relevant to transfer under 28 U.S.C. § 1404(a), the statutory replacement for domestic forum non conveniens in federal courts. A transfer under § 1404(a) results in a change of courtrooms, not a change of law. *See Van Dusen v. Barrack*, 376 U.S. 612, 636-37, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964); *see also Ferens v. John Deere Co.*, 494 U.S. 516, 524-25, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990).

Second, unlike *Piper*, there are no possible co-defendants or third-party defendants who could not be made to appear in the American forum. Indeed, quite the opposite problem exits in this case: If this suit were dismissed in favor of a suit in the Dominican Republic, it is not clear that defendant Rosa would appear, or could be compelled to appear, in that forum. Although "the relative ability of the forums to compel the attendance of significant unwilling witnesses at trial" is an important private interest factor, *see* 17 James Wm. Moore et al., *Moore's Federal Practice* § 111.74[3][c][iii] (3d ed.1997), the district court did not accord this factor any weight because Rosa "agreed" to participate in legal proceedings in the Dominican Republic. The plaintiffs expressed concern that Rosa's "agreement" was feigned. Indeed, in their Rule 60(b) motion in the district court for reconsideration of the dismissal, plaintiffs produced affidavits from two people who recount that Rosa told them he did not plan to return to the Dominican Republic where he faces possible imprisonment. Despite this concern, the district court did not make its forum non-conveniens dismissal contingent upon Rosa's participation in the proceeding in the Dominican Republic, either by so ordering in its original dismissal or by amending its dismissal order in response to plaintiffs' Rule 60(b) motion.

Third, unlike *Piper*, there is no showing that access to proof—even aside from Rosa's testimony—would be easier in the Dominican Republic. The Giants asserted in their motion to dismiss in the district court that "the costs of bringing witnesses to California would be significantly greater than litigating the matter in the Dominican Republic," and that "United States citizens have much easier access to the Dominican Republic than Dominican Republic citizens have to enter the United States." But there is no evidence to support these assertions. Indeed, the only evidence before the

district court was a declaration tending to show the opposite, stating that visas would be readily available to plaintiffs.

In *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir.1983), this court noted that "the standard to be applied [to a motion for dismissal on the ground of forum non conveniens] is whether . . . defendants have made a clear showing of facts which . . . establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent. . . ." *Id.* at 1410. The record in this case indicates the district court misunderstood this standard: rather than treating forum non conveniens as an exceptional tool to be employed sparingly, the district court perceived it as a doctrine that compels plaintiffs to choose the optimal forum for their claim. We recognize that the Supreme Court in *Piper* held that "a foreign plaintiff's [forum] choice deserves less deference" than the forum choice of a domestic plaintiff. But less deference is not the same thing as no deference. *See Lony v. E.I DuPont de Nemours & Co.*, 886 F.2d 628, 633 (3d Cir.1989). We hold that it was an abuse of discretion for the district court to deny plaintiffs their choice of federal district court in San Francisco as their forum.

VI

The decision of the district court is therefore REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C98-1414 FMS.

YAN CARLOS RAVELO MONEGRO, *et al.*,
Plaintiffs,

v.

LUIS ROSA, *et al.*,
Defendants.

Aug. 28, 1998.

ORDER DISMISSING ACTION

SMITH, J.

INTRODUCTION

Pending before the Court is defendant San Francisco Baseball Associates dba San Francisco Giants' ("Giants") motion to dismiss this action on the ground of forum non conveniens, or, in the alternative, to abstain from hearing this action in view of the parallel proceedings in the Dominican Republic.[1] Because the Court finds that the Dominican Republic is an adequate alternative forum and that it is a more convenient forum than San Francisco for this action, the Court GRANTS defendant's motion for dismissal on the ground of forum non conveniens.[2]

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[1] Defendant Jack Hiatt has joined in the San Francisco Giants' motion to dismiss.

[2] The Court does not reach the abstention issue.

BACKGROUND

Plaintiffs Yan Carlos Ravelo Monegro, Nelson Rolando Gonzalez Sosa, Franklin Alvarez Galvez, Rafael Micael De La Cruz, Francisco De Los Santos Heredia, Porfirio Alfredo Vasquez Mota, Manuel Acevedo, Angel Esteban Guillen Solano, Carlos Celedonio Sujilio, Edelmiro Reyes Santana, Ignacio Henriquez De La Rosa, Fernando Romero, and Tulio Miguel Lizardo Nolosco ("plaintiffs") claim that they were harassed by their general manager Luis Rosa ("Rosa") during their employment as professional baseball players for the Giants' minor league team in the Dominican Republic. Plaintiffs claim that Rosa subjected them to sexual jokes, comments, and inquiries, uninvited and unwanted sexually oriented physical contact and gestures, and sexual advances for which the penalty of refusal was suspension or termination. Plaintiffs claim that Rosa's sexual harassment substantially affected their employment and ultimately resulted in plaintiffs' termination when they refused to submit to said sexual harassment and refused to perform the sexual acts demanded by Rosa. The alleged harassment occurred almost entirely in the Dominican Republic, with the exception of the alleged harassment of plaintiff Rafael Micael De La Cruz ("De La Cruz"), who claims to have been harassed by Rosa in Arizona when De La Cruz was assigned there under his contract. Plaintiffs also allege that Rosa converted a portion of each of plaintiffs' paychecks for his own purposes.

Plaintiffs claim that defendant Jack Hiatt ("Hiatt"), Minor League Coordinator for the Giants, and other supervisors of Rosa were aware or should have been aware of Rosa's conduct toward plaintiffs. Plaintiffs allege that the Giants had no established or published policy regarding sexual harassment and failed to provide any method for remedying sexual harassment.

The Complaint in this action was filed on April 7, 1998, and alleges the following causes of action against Rosa, the Giants, and Hiatt (collectively "defendants"): (1) violation of Title VII of the Civil Rights Act of 1964; (2) battery and sexual battery under California statutes; (3) termination of employment in violation of the California Fair Employment and Housing Act ("FEHA"); (4) sexual harassment under the FEHA; (5) fraud under California law; (6) conversion under California law; (7) sexual harassment under New York law; (8) sexual harassment in violation of the law of that [sic] Dominican Republic; (9) wrongful termination in violation of public policy of the Dominican Republic, United States, California, and New York; (10) breach of contract of continued employment; (11) breach of the implied covenant of good faith and fair dealing; (12) intentional infliction of emotional distress; (13) negligent infliction of emotional distress; (14) negligent hiring, training, supervision, and retention of unfit employee (against Giants only); (15) fraud as to plaintiff Carlos Celedonio Sujilio only; and (16) intentional interference with prospective economic advantage.

Each of the 13 plaintiffs in this action has also brought suit against Rosa and the Giants in the Dominican Republic. The 13 plaintiffs filed three civil suits against Rosa and the Giants in the Dominican Republic in June 1997. These suits have been consolidated into a single combined civil and criminal action,[3] in which plaintiffs accuse Rosa and the Giants of sexual harassment, abuse of trust, and fraud. Castillo Decl., ¶¶ 4, 9.

Plaintiffs, who are all citizens and residents of the Dominican Republic, are represented by attorneys there. The

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[3] In the Dominican Republic, when a civil claim is based on alleged criminal misconduct, an individual can initiate criminal charges and request that a civil remedy be granted in the same proceedings. This is what plaintiffs have done in this case.

Giants are also represented by counsel in the Dominican Republic and have made their personnel available in the court's proceedings. Rosa, who has now resigned from the Giants and resides in Puerto Rico, voluntarily appeared in the Dominican Republic and presented himself for questioning before the Investigator Judge. After Rosa's questioning, the Dominican Republic Investigator Judge ordered that Rosa be jailed. Rosa was later released on bail on the condition that he agree to return to the Dominican Republic whenever he is required to do so by Dominican authorities. The proceedings in the Dominican Republic are currently stayed pending appeals.

Plaintiffs each had a standardized Minor League Player Contract with the Giants that stated, "This Minor League Uniform Player Contract shall be governed by and interpreted in such a manner as to be effective and valid under New York law." Opp.Ex. B, ¶ XXV. With the exception of plaintiff De La Cruz, all of the plaintiffs played for the Giants exclusively in the Dominican Republic. Plaintiffs claim that all of their employment records are in San Francisco. Plaintiffs also claim that all of Rosa's supervisors work and reside in San Francisco.

On June 30, 1998 defendants moved to dismiss this action on the grounds of forum non conveniens and the doctrine of international abstention.

DISCUSSION

I. Legal Standard—Forum Non Conveniens

The doctrine of forum non conveniens allows a court to decline to exercise jurisdiction when the court believes the case would be more appropriately or conveniently tried elsewhere. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). A district court entertaining a forum non conveniens motion to dismiss must first decide whether an adequate alternative forum exists to

hear the case. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir.1991); *Lony v. Du Pont*, 886 F.2d 628, 633 (3rd Cir.1989). Ordinarily, the requirement of an adequate alternative forum will be satisfied when the defendant is amenable to process in the other jurisdiction. *See Piper Aircraft*, 454 U.S. at 255; *Lockman*, 930 F.2d at 768.

The possibility of a change in substantive law unfavorable to the plaintiff is not given substantial weight, and so generally will not prevent a finding that an alternative forum is adequate. *See Piper Aircraft*, 454 U.S. at 250. In rare instances, however, an unfavorable change in law is relevant. *See id.* "If the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all . . . the district court may conclude that dismissal would not be in the interest of justice." *See id.* at 254. "For example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *See id.* at 254 n. 22.

If a district court finds there is an adequate alternative forum, the court must then consider and balance several private and public interest factors that are relevant to the forum non conveniens determination. *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir.1991). The Supreme Court set out these factors in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). The private interest considerations are:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of the case easy, expeditious, and inexpensive. There may also be

questions as to the enforceability of a judgment if one is obtained. 330 U.S. at 508.

The public interest factors relevant to a forum non conveniens decision are administrative difficulties that follow from litigating in "congested centers" instead of handling matters at their origin; the interest in not imposing jury duty upon people of a community that has no relation to the litigation; the desire in cases that touch the affairs of many people to hold the trial in their view rather than in a remote location where they can only learn about it by report; the local interest in having localized controversies decided at home; and finally, the interest in having a trial in a forum that is at home with the law that governs the case. *See id.* at 508-09.

The plaintiff's choice of forum should rarely be disturbed, unless the balance of the above factors is strongly in favor of the defendant, or the plaintiff has chosen an inconvenient forum to "vex," "harass," or "oppress" the defendant. *See id.* at 508. Less deference is due to the plaintiff's choice of forum, however, when the plaintiff is not a resident of and has no ties to the forum. *See Piper Aircraft*, 454 U.S. at 255. When an American plaintiff chooses her home forum, it is reasonable to assume that this choice is convenient. *See id.* In contrast, when a foreign plaintiff chooses a United States forum, this assumption is less reasonable. *See id.*

The defendant bears the burden of persuasion on all elements of the forum non conveniens analysis. *See Lony*, 886 F.2d at 632. If the balance of factors is found to be close to equipoise, dismissal should not be granted. *See id.* at 635.

II. Analysis

A. Adequacy of Alternative Forum

The plaintiffs have already sued Rosa and the Giants in the Dominican Republic, and the defendants have appeared in

those proceedings, so the Court begins with a presumption that the Dominican Republic is an adequate alternative forum. *See Piper Aircraft*, 454 U.S. at 255; *Lockman*, 930 F.2d at 768. Plaintiffs argue, however, that the Dominican Republic does not constitute an adequate forum because (1) a Dominican trial would not address Rosa's activities in Arizona, (2) wrongful termination is not a cause of action in the Dominican Republic, (3) there is no civil discovery in the Dominican Republic, and (4) the Dominican Republic's legal system is tainted by corruption.

At oral argument, plaintiffs maintained, without citing to any authority, that Dominican courts lack jurisdiction to resolve disputes arising out of activity that occurred in the United States. Plaintiffs have offered no evidence to support their assertion that a Dominican court could not resolve De La Cruz's claims regarding Rosa's conduct in Arizona. In contrast, defendants have submitted a declaration stating that Dominican Republic courts can apply American law. 2nd Castillo Decl., ¶ 18. Furthermore, Dominican courts have an interest in De La Cruz's dispute with Rosa that would justify their jurisdiction because De La Cruz is a Dominican citizen.

In response to plaintiffs' second objection, defendants assert that wrongful termination is a cause of action in the Dominican Republic, and their translation of the Civil Code of the Dominican Republic supports this assertion. 2nd Castillo Decl., Ex. B, Ch. IV, Art. 95. Even if wrongful termination were not a cause of action in the Dominican Republic, however, because a change of substantive law unfavorable to the plaintiffs is not generally given substantial weight, *see Piper Aircraft*, 454 U.S. at 250, the Dominican Republic could still be found an adequate forum.

Plaintiffs argue that the Supreme Court's statement that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute," *Piper Aircraft*, 454 U.S. at 254 n. 22, means that a

forum that does not allow a specific cause of action is inadequate. The more reasonable interpretation, however, is that a forum is inappropriate if there is no remedy at all for a wrong experienced by plaintiffs. In this case, because plaintiffs can recover for sexual harassment, sexual assault, fraud, and breach of contract in the Dominican Republic, they do have a remedy there. The removal of one of their claims would not necessarily make the remedy or the forum inadequate.

Defendants also assert that plaintiffs are inaccurately describing the Dominican Republic legal system when they claim that there is no civil discovery there. Defendants have offered evidence that courts in the Dominican Republic have the power to require parties to produce evidence and witnesses in both criminal and civil cases. 2nd Castillo Decl., ¶ 16. The Ninth Circuit has found that differences in discovery procedures alone do not make a forum inadequate. *See Lockman*, 930 F.2d at 768 (finding that although Japanese discovery procedures were not identical to those in the United States, Japan was an adequate forum).

Plaintiffs also claim that the Dominican Republic is an inadequate forum because its legal system is corrupt. The Court is hesitant to pass judgment on the integrity of another sovereign's courts. "It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir.1991); *see also Banco Mercantil v. Hernandez Arencibia*, 927 F.Supp. 565, 567 (D.P.R.1996) (noting that a finding that the Dominican Republic is an inadequate forum due to alleged corruption would lead to a flood of United States litigation involving disputes having no connection with the United States except for the fact that one party is domiciled in the United States).

Plaintiffs have submitted declarations indicating that the Giants' attorney in the Dominican Republic is distantly

related to the Attorney General of the Dominican Republic. Opp'n Exhs. D, E. They claim that as a result of this relationship, Rosa received special treatment while he was in prison and was inappropriately allowed to leave the country. Opp'n Exh. E. Plaintiffs have presented no evidence demonstrating that others in Rosa's position are treated differently or that the proceedings against Rosa and the Giants before the Dominican courts have been influenced in any way. Plaintiffs conceded at oral argument that their evidence does not show that Dominican courts are corrupt either as a general matter or with respect to the plaintiffs' case. The Court finds that the Dominican Republic is an adequate alternative forum.

2. Convenience

a. Private Interest Factors

The *Gulf Oil* list of private interest considerations demonstrates that it would be more convenient to try this case in the Dominican Republic than in San Francisco. The most significant sources of proof, particularly the plaintiffs themselves and other percipient witnesses to Rosa's conduct and the relationship between Rosa and the plaintiffs, are in the Dominican Republic. Rosa's supervisors and other witnesses from the Giants are in San Francisco, but it appears that there are many more plaintiffs than Giants officials who would need to testify. Bringing these Dominican citizens to the United States is both more difficult and more expensive than bringing American citizens to the Dominican Republic. It will also be much easier and less expensive to transport any relevant employment and financial records located in San Francisco to the Dominican Republic than to bring witnesses and parties to San Francisco.

Although it is true that compulsory process for the attendance of a key witness, Rosa, is only available in the United States because Rosa is a United States citizen and resident of Puerto Rico, Rosa has already voluntarily

appeared in the proceedings in the Dominican Republic and has agreed to return to the Dominican Republic to participate in further legal proceedings.

There do not appear to be any other major factors affecting the ease, expeditiousness, or expense of the trial. Nor has either party submitted evidence that there are any premises in the Dominican Republic that need to be viewed. Plaintiffs argue that it would be easier to enforce a judgment in the United States than in the Dominican Republic, because the Giants' have substantial assets in the United States, whereas neither Rosa nor the Giants have property in the Dominican Republic that could be seized to enforce a judgment. Opp'n Exhs. D, E. Even so, when viewed together, the private interest factors indicate that the Dominican Republic is still the more convenient forum.

b. Public Interest Factors

Analysis of the public interest factors also demonstrates that the Dominican Republic is the more convenient forum. There is no evidence to suggest that one court system is more congested than the other, but other factors show that San Francisco's interest in these proceedings is minimal compared with the Dominican Republic's. The emphasis of the jury duty element of the *Gulf Oil* convenience test is that a community should not be burdened with jury duty if it has no relation to the litigation. *See id.* at 508-09. The community of the San Francisco Bay Area does have a relation to this litigation, because the community is concerned with the actions and reputation of its local baseball team; however the Dominican Republic has a much greater interest in ensuring that its ci[illegible]ns are not harmed by foreign employers.

This case does not impact the affairs of a large number of people, so that factor does not affect the analysis. Given the prevalence of baseball recruitment and hiring by American teams in the Dominican Republic, the interest in having localized controversies decided at home weighs in favor of

the Dominican Republic. Because the claims in this case involve both United States law and Dominican Republic law, the court in either forum would have to apply foreign law, so this factor of the convenience test does not favor either of the two locations. The Court also notes that, with the exception of plaintiffs' Title VII claims, which may not even be viable, *see* 42 U.S.C. § 2000e-1 (Title VII protection does not extend to aliens employed outside the United States), all of the claims in this action would require the district court to apply foreign law. The Dominican courts, on the other hand, would be applying both Dominican law and foreign law.

Overall, the private interest factors demonstrate that the Dominican Republic is the more convenient forum, and the public interest factors favor the Dominican Republic as well. The Court therefore DISMISSES this action on the grounds of forum non conveniens.

Conclusion

For the foregoing reasons, defendants' motion to dismiss on the ground of forum non conveniens is GRANTED.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C98-1414 FMS

YAN CARLOS RAVELO MONEGRO, *et al.*,
Plaintiffs,

v.

LUIS ROSA, *et al.*,
Defendants.

Jan. 28, 1999

ORDER DENYING REQUEST TO ENTERTAIN MOTION FOR RELIEF FROM JUDGMENT AND VACATING HEARING

SMITH, District J.

INTRODUCTION

Plaintiffs Yan Carlos Ravelo Monegro, Nelson Rolando Gonzalez Sosa, Franklin Alvarez Galvez, Rafael Micael De La Cruz, Francisco De Los Santos Heredia, Porfirio Alfredo Vasquez Mota, Manuel Acevedo, Angel Esteban Guillen Solano, Carlos Celedonio Sujilio, Edelmiro Reyes Santana, Ignacio Henriquez De La Rosa, Fernando Romero, and Tulio Miguel Lizardo Nolosco ("plaintiffs") have filed a motion asking whether the Court would entertain a motion for relief from judgment pursuant to Federal Rules of Civil Procedure 60(b) ("Rule 60(b)"). The case was dismissed on the ground of forum non conveniens on August 28, 1998, based on a

finding that the Dominican Republic is a more convenient forum. Because an appeal of that order is currently pending, this Court has no jurisdiction to entertain a motion to reconsider. *See Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir.1976). Accordingly, plaintiffs have filed this request in the hope that the Ninth Circuit will remand the case if the Court is willing to entertain such a motion.

Plaintiffs base their request on two third-party declarations that state that defendant Luis Rosa ("Rosa") has said that he will not return to the Dominican Republic for further legal proceedings. Plaintiffs contend that this newly-discovered evidence of Rosa's unavailability makes the Dominican Republic an inadequate forum. Because plaintiffs have failed to establish that Rosa cannot be extradited to the Dominican Republic, or that his videotaped testimony cannot be obtained and admitted in a Dominican Court, the Court will not entertain a motion to reconsider. Plaintiffs' request is DENIED.

DISCUSSION

The facts in this case are summarized in the Order Dismissing Action entered on August 28, 1998. The Court's forum non conveniens determination was based on a comprehensive list of private and public interest factors, only one of which was Rosa's agreement to return to the Dominican Republic to participate in further legal proceedings. Plaintiffs' request for reconsideration leaves the remaining factors unchallenged, including the Court's primary consideration that the thirteen plaintiffs and the percipient witnesses to Rosa's conduct continue to reside in the Dominican Republic.

Rule 60(b) governs the reconsideration of final orders. Reconsideration of an order may be justified if parties come forward with newly discovered evidence. F.R.C.P. 60(b)(2). The Ninth Circuit has held that to obtain relief from a judgment on the basis of newly-discovered evidence under

Rule 60(b)(2); however, the moving party must show in pertinent part that " 'the evidence was of such magnitude that production of it earlier would have been likely to change the disposition of the case.' " *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir.1990) (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir.1987)). The party making such a request bears a "heavy burden" to demonstrate that this criteria has been met. *See In re Korean Air Lines Disaster of September 1, 1983*, 156 F.R.D. 18, 23 (D.C.Cir.1980) (citing *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597-98 (5th Cir.1980)).

Plaintiffs have not met their heavy burden to show that the newly-discovered evidence is likely to change the outcome of the case. They argue that Article VIII of the 1910 Extradition Treaty ("Treaty") as interpreted by the Supreme Court in *Valentine v. U.S. ex rel. Neidecker*, 299 U.S. 5 (1936) prohibits the United States from extraditing its citizens. Rosa is a U.S. citizen and is currently in Puerto Rico. If he will not attend a Dominican trial, plaintiffs argue that they will be unable to obtain his attendance through extradition for the criminal charges related to this case. In *Hilario v. United States*, 854 F.Supp. 165, 168-70, 173 (E.D.N.Y.1994), however, the court determined that 18 U.S.C. § 3196 ("section 3196"), passed after the Supreme Court decision in *Valentine*, operates in conjunction with Article VIII of the 1910 Extradition Treaty to give the Secretary of State of the United States the discretion to extradite U.S. citizens if the other requirements of the Treaty are met. Because Rosa has been charged with multiple crimes in connection with his alleged sexual harassment of plaintiffs, the Secretary of State may yet exercise the option to extradite Rosa to the Dominican Republic for trial.

Plaintiffs also contest the constitutionality of section 3196; however, the Court agrees with the *Hilario* court's determination that Congress' decision to use a statute to

empower the Secretary of State to extradite U.S. citizens is consistent with the Treaty. *See Hilario*, 854 F.Supp. at 173. The *Hilario* Court [sic] based its determination on the Supreme Court's express statement in *Valentine* that under our constitutional system, "the power to extradite can be conferred either by legislation or treaty amendment." *Hilario*, 854 F.Supp. at 173 (citing *Valentine*, 299 U.S. at 18.) With the enactment of section 3196, Congress simply opted to use legislation to "serve the Constitution's requirement for a specific legal conferral of the power to extradite." *Id.*

Further, plaintiffs argue that Rosa's alleged offenses are not extraditable. Plaintiffs cite *United States v. Medina*, 985 F.Supp. 397, 399 [sic] for the proposition that a person can only be extradited if he has been charged with an offense listed under Article II of the Treaty, or if his alleged acts would support criminal charges in both the requesting and the surrendering countries. Plaintiffs claim that wrongful termination and sexual harassment do not satisfy these criteria.[1]

Plaintiffs have the burden to show that none of the charges levied against Rosa in the Dominican Republic are extraditable offenses under the Treaty. Defendants list the allegations against Rosa in the Dominican Republic, among which abuse of trust, fraud, carnal abuse and attempted molestation of a minor may be extraditable offenses under Article II of the Treaty depending on the facts supporting the charges. *See Medina*, 985 F. Supp at 399. Plaintiffs, on the other hand, have not addressed any of the allegations against Rosa other than the sexual harassment and wrongful termination claims. In the absence of detailed evidence

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[1] Defendants' cite to the 1933 Convention on Extradition is misplaced because that treaty presently is inoperative between the Dominican Republic and the United States. *See* 1933 Convention on Extradition, art. 21.

surrounding all of the charges brought against Rosa, plaintiffs have not met their burden to show Rosa's alleged offenses are not extraditable under Article II of the Treaty.

Plaintiffs contend that under Article IV of the Treaty, even if Rosa was charged with a crime listed under Article II, the doctrine of specialty would preclude him from being tried in the Dominican Republic for the noncriminal offenses of sexual harassment and wrongful termination. *See Medina*, 985 F.Supp. at 400 (quoting *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir.1995)). The doctrine of specialty requires that the extradited defendant be tried only for the crime for which he was surrendered. It is premature to consider whether the requirement of this doctrine will be satisfied at trial without evidence showing which of Rosa's offenses are extraditable.

The Court has also suggested that Rosa's testimony could be videotaped in the United States and used in plaintiffs' case in the Dominican Republic, even if Rosa cannot be compelled to attend the trial itself. Plaintiffs have submitted a declaration of a Dominican lawyer that opines that videotaped testimony might not be admissible in the Dominican Republic. Such an opinion, unsupported by citation to Dominican authority, is insufficient to establish that videotaped testimony would be inadmissible. Because plaintiffs have not even demonstrated that they will be unable to obtain Rosa's testimony in a Dominican proceeding, they have not met their heavy burden to establish that his potential unavailability will affect the outcome of the case.

CONCLUSION

For the foregoing reasons, the Court DENIES plaintiffs' request to entertain a motion for relief from judgment. The hearing on this motion currently scheduled for January 29, 1999 at 10:00 a.m. is VACATED.

SO ORDERED.

APPENDIX D

[Filed Jul. 10, 2000]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16846

D.C. No. CV-98-01414-FMS

YAN CARLOS RAVELO MONEGRO; NELSON ROLANDO GONZALEZ SOSA; FRANKLIN ALVARES GALVEZ; RAFAEL MICAEL DE LA CRUZ; FRANCISCO DE LOS SANTOS HEREDIA; PORFIRIO ALFRED VASQUEZ MOTA; MANUEL ACEVEDO; ANGEL ESTEBAN GUILLEN SOLANO; CARLOS CELEDONIO SUJILIO; EDELMIRO REYES SANTANA; IGNACIO HENRIQUEZ DE LA ROSA; FERNANDO ROMERO; TULIO MIGUEL LIZARDO NOLOSCO,

Plaintiffs-Appellants,

v.

LUIS ROSA; JACK HIATT; SAN FRANCISCO BASEBALL ASSOCIATES, L.P., DBA SAN FRANCISCO GIANTS,

Defendants-Appellees.

Before: BRIGHT[1] PREGERSON and W. FLETCHER, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing. Judges Pregerson and W. Fletcher have voted to deny the

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[1] Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

petition for rehearing en banc; and Judge Bright so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.